IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 358 of 1999
In
SPECIAL CIVIL APPLICATION No. 2490 of 1998
With
CIVIL APPLICATION No. 7891 of 2000
In
LETTERS PATENT APPEAL No. 358 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BATA (INDIA) LIMITED & 2 - Appellant(s)

Versus

SK CHAWLA - Defendant(s)

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Appearance :
M/S TRIVEDI & GUPTA for Petitioner No(s).: 1,2,3.
MR TR MISHRA for Respondent No(s).: 1.
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CORAM: HONOURABLE MR.JUSTICE R.S.GARG
and
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date : 04/08/2005

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Present is an appeal under Clause-15 of the Letters Patent by the dissatisfied employer against the order dated 8.2.1999 passed in Special Civil Application No. 2490 of 1998, whereunder the award dated 10.3.1997 made by the Presiding Officer, Labour Court, Ahmedabad, in Reference (LCA) No. 854 of 1987 has been approved with a direction in favour of the respondent-workman for his reinstatement with 60% back-wages.

2. The appellant is before this Court with a complaint that the Labour Court, so also the learned Single Judge did not appreciate that the respondent was not coming within the sweep of the definition of "workman" as given under Section 2(s) of the Industrial Disputes Act, 1947 and that the two courts below were absolutely unjustified in observing that the respondent-workman did not commit any mistake which could lead to his termination.

3. The facts necessary for disposal of the present appeal are that the present respondent was employed in the year 1963, subsequent thereto, he was confirmed in the services and finding that his services were useful and satisfactory, he was promoted as Shop Manager with effect from 12.12.1976. The agreement of promotion,

which also assigns duties to the respondent is on the record. After the respondent was promoted as Shop Manager, he was required to look after Saraspur branch of the appellant Bata Company and in accordance with the promotion letter-cum-agreement, he was to discharge certain duties.

4. It appears that somewhere in the year 1985, in the communal riots, the shop at Saraspur branch was put to fire and thereafter, it was required to be repaired and reconstructed. A contract for renovation of the shop was given to a private contractor, who commenced the work and on alleged completion of the work, he submitted the bill. The respondent, who was in charge of the work and was also to supervise the renovation, approved the bill and informed the higher authorities that the renovation work was complete. Recommendations were accordingly accepted and the payment was made, however, after some time, it was found that the work was in progress, it was never completed and the payment was made on account of wrong recommendation on strength of a false bill. Immediately thereafter, the respondent was put to an explanation and a charge sheet was served upon him on 27.11.1995. On 30.11.1995, the respondent submitted his reply and made a clear submission that under certain mistakes, he approved the

bill and he was ready and willing to refund the amount, along with his written statement/written submissions. He submitted a draft for an amount of Rs. 25,000/-.

5. Still dissatisfied with the explanation and the conduct exhibited by the respondent, the establishment proceeded with the inquiry. The establishment examined certain witnesses and the respondent offered himself as a witness. He made certain submissions in his own favour and was also subjected to cross-examination. After recording the evidence and hearing the parties, the Departmental Committee came to a conclusion that the guilt was proved beyond shadow of doubt and the respondent was required to be terminated. The services were accordingly brought to an end.

6. Being dissatisfied with the punishment offered, the respondent asked for a Reference. The appropriate government made the Reference. During course of the hearing before the Labour Court, Exh.49 was submitted by the workman to say that he was not challenging the procedure adopted during course of the inquiry nor was challenging the propriety of the inquiry, but was challenging the correctness and validity of the findings recorded by the Inquiry Officer and was also challenging the quantum of punishment. The present

appellant, however, submitted before the learned Labour Court that the Reference at the instance of the respondent was not maintainable, because, he was not a workman falling within the definition of workman as provided under Section 2(s) of the Act and further that the findings recorded by the Inquiry Officer were based on proper scrutiny and marshalling of the evidence as the findings were in accordance with law and were based on due appreciation of evidence, there was no scope to interfere with the same.

7. The learned Labour Court, after hearing the parties, rejected the objection relating to maintainability of the Reference and observed that the nomenclature given to the post of the respondent was not decisive, because, the nature of the duties was to decide the status of the respondent. It found that the respondent, in fact, was a workman, coming within the definition. It also found that the respondent did not commit any wrong and as such, he was entitled to be reinstated. It accordingly directed reinstatement with 60% back-wages.

8. Being aggrieved by the said award, the establishment filed Special Civil Application No. 2490 of 1998 and since after dismissal of the same, are before this Court under Clause-15 of the Letters Patent.

9. Learned counsel for the appellant, after taking us

through the agreement, dated 12.12.1976 submitted that perusal of the agreement, which is otherwise undisputed, would make it clear that the respondent was, in fact, appointed in the managerial cadre, he was to work as Manager, he had the authority to collect money, pay the salary, was also entitled to employ daily wagers, write the Confidential Reports of the daily wagers and do certain other acts. According to him, if Manager was required to do certain clerical acts, the Manager would not become a workman for the purposes of the Act. After taking us through the cross-examination of the respondent, it was submitted that the learned Labour Court, so also the learned Single Judge misread the evidence and did not consider the evidence, which was placed on the records. His submission, in fact, is that the findings recorded by the learned Labour Court, so also by the learned Single Judge are perverse and deserve to be interfered with in these proceedings. He also submitted that the nature of the misconduct was such which could lead to only one punishment. According to him, if a person, who was obliged to supervise a particular operation or work plays a fraud and gives approval to a bill before the work is completed and thereafter starts depositing the money, then, the deposit of the money would not be a

mitigating circumstance, because, the misconduct is such which cannot be pardoned. His submission is that on both counts, i.e. Reference is not maintainable and that the misconduct is proved, the respondent was not entitled to any relief.

10. Learned counsel for the respondent, after taking us through the cross-examination of the workman, submitted that though the respondent was given certain authority over certain persons and was to refer certain matters to the higher authorities or to the senior management, he continued to be a clerical staff. His submission is that the duty assigned to the respondent would be decisive of the cadre and not the nomenclature attached to the post. Regarding alleged misconduct, it was submitted that though the work was incomplete, the Zonal Manager and other officers, who were visiting the shop intermittently knew that the work was incomplete and if they approved the bill for payment, it must be held that they required the respondent to make the payment. It is also submitted by the learned counsel for the respondent that present was not a case of misappropriation or misconduct, but in fact, was a case where after realising the mistake, the respondent deposited a sum of Rs. 25,000/- on the first occasion and also deposited a sum of Rs. 13,000/- and odd on the

second occasion, his submission is that there is no scope for interference.

11. Copy of the award has been filed at page 46/1 to 46/39. At page 46/11, the learned Presiding Officer of the Labour Court has referred to the cross-examination of the respondent. In the cross-examination, the respondent had admitted that he was promoted as Shop Manager and was confirmed in the year 1974. He also admitted that when the incident took place, he was performing his duties at Saraspur branch. He also admitted that in Saraspur branch, in all six persons were working including him. Five persons were working under him. He also admitted that four temporary persons were working in the branch. He also admitted that he was member of Bata Managers' Association. He also admitted that he remained as Executive in the Managers' Association and when the incident took place, he was holding the office of the Executive, he was holding the position of District Organizer for a period of five to six years. He also admitted that in his capacity of the Executive of the Union, he had knowledge about the agreement relating to the salary which was being settled between the Company and the Union. He also admitted that on his promotion an agreement was entered into between the Company and

himself and he was aware of the contents of the same. He also admitted that he had the powers to recruit temporary employees. He also admitted that he could give a fixed-time employment to the temporary employees. He also admitted that during his employment, he appointed temporary workers though immediately he withdrew that statement. He also admitted that he use to receive the total cash income during the day, was to deposit the same with the bank and was to obtain drafts and the said drafts were sent to the bank, he was to prepare the statement showing the goods received from the Company and the goods sold in the outlet. He also admitted that he was to pay the salary to the workers working in the outlet. He also admitted that he has goods and the stock under his control. He also admitted that he was making yearly statement of accounts and was also referring annual performance sheet to the higher management. He also admitted that he was sending the annual performance reports of the temporary workmen. He also admitted that he transferred a particular person from his branch to another branch. He also admitted that he use to give marks in the progress reports and such marks were given by him after observing the work of such employees. He also admitted that he had forwarded the leave applications to the

management for grant of leave. He also admitted that he was requiring the temporary employees to affix their signatures in the attendance register and he use to affix his counter signature. He also admitted that he was to look after the staff working in the said branch. From these works assigned to him and the agreement dated 12.12.1976, it would clearly appear that he was, in fact, in the managerial/supervisory staff. However, Mr. T.R. Mishra submits that from the cross-examination of the other witness produced by the management, it would clearly appear that the works assigned to the respondents were of clerical nature. His submission is that the respondent was required to prepare balance-sheet, make statements, open and close the shop, show articles to the customers, receive money, deposit the same in the bank, obtain the drafts, forward the same to the senior officers, therefore, he was, in fact, in the clerical cadre. He took us to the cross-examination of the witnesses of the establishment.

12. The question posed before us is whether the respondent was appointed as Clerk and was required to do some managerial work or he was promoted as Manager and was required to do some clerical work. After going through the entire record, we must observe that if the

cross-examination of the respondent is read with the agreement dated 12.12.1976, it would lead to only irresistible conclusion that the respondent was appointed in the managerial cadre. The two courts below have not seen his statements and the documents in their true perspective and have, very cursorily observed that he was coming within the sweep of the definition of workman as provided under the Act. The findings, in fact, are in ignorance of the evidence available on the records and in fact are contrary to the records. The agreement dated 12.12.1976 makes clear that the respondent was being promoted from the post of a Clerk to the post of a Shop Manager. The agreement provides that the respondent was to look after all the expenses incurred for maintaining the shop, he was to take decisions relating to lightening, heating and cleaning the establishment, small repairs which are not of permanent nature, telephone, office necessities, supplies, postages, bank charges, maintenance of satisfactory quality and proper inventory of the stock, furniture, fixtures etc. He was also required to look after the work of window trimmings, seasonal decorations and local advertisements. He was also to spend particular amount under the directions of the Company. It is also to be seen that he was to be held

responsible for proper observance looking after the stock of shoes and other goods including furniture, fittings and customer's articles as well as the advertisement accessories. He was to look after the stock and the dead stock and was also required to clear all the dead stock under the instruction and at the cost of the Company. All these duties, which were ascribed to him and were also discharged by him, by no stretch of imagination can be said to be of clerical nature. Where a person is given authority to take independent decision in a particular manner in a particular matter, then, it cannot be said that he continues to be a clerical person and had no independent authority to take a decision. In the present matter, the respondent was appointed in the managerial cadre, was assigned duties of supervision and management and in fact, was discharging the said duties. At this stage, we would also be justified in referring to a judgment of the Supreme Court in the matter between **S.K. Maini Vs. Carona Sahu Co. Ltd., reported in 1994 (2) LLJ 1153.** In the said matter, the Supreme Court observed that the terms and conditions of the services whereunder the employee takes charge of the establishment would be decisive factor. In the said matter, the said employee, by virtue of his being

in charge of the establishment was the Principal Officer in charge of the management of the shop. The Supreme Court observed that the said employee was required to do some works of clerical nature, but by and large, he was in charge of the management of the shop and had been principally discharging administrative and managerial work. Almost with the identical situation in the present matter, under the terms and conditions of services, the respondent was asked to take charge of the establishment and after the shop was put to fire, he was required to supervise the work of reconstruction/renovation. In his capacity as the Manager, he was to approve the bill and forward the same for payment and only after his approval, the bill was sanctioned and paid. He was to look after day-to-day management, he was to appoint temporary employees and make payment to them. When he was required to do some clerical work and assuming it was one-man branch, then, a Shop Manager would not become a Clerk or a Peon. The duties of a Shop Manager would be decided by the establishment and in the present case, the agreement dated 12.12.1976 clearly decides the duties assigned to the respondent. We have no hesitation in holding that the Reference at the instance of the respondent, who was not a workman, was not

maintainable.

13. So far as the alleged misconduct is concerned, the learned Labour Court, in our considered opinion, looked to the facts with tainted vision. It approached to the facts with perversity. The facts, which are not in dispute were that the shop was burnt during the communal riots, the shop was to be repaired/renovated. The respondent was asked to look after the work and was to approve the bill after the work was over. The respondent, in his capacity as the Supervisor and Manager was to see that the work was completed right in time and in accordance with the specifications and only thereafter the bill was submitted. Undisputely, the bill was submitted before the work was completed. After the bill was approved by the respondent, payment was made to the contractor. At a later point of time, it was detected that the work was under progress and the amount was paid under the wrong recommendation of the respondent much before the completion of the work. When this was taken to be a misconduct, the respondent immediately tendered his apology and returned back an amount of Rs. 25,000/-. If the work had already come to an end and nothing else was required to be done, then, there was no occasion for the respondent to refund the amount of Rs. 25,000/-. Mr. Mishra vehemently submitted

that after realising the mistake, the respondent deposited the sum of Rs. 25,000/- from his own pocket. Assuming that to be correct, would that be a solace to a person who committed a misconduct? It is not a case where the respondent was not to supervise the work. He was to collect complete information and upon such information, he could make recommendations. In fact, the respondent was aware that the work was incomplete and was being carried out despite that, he certified that the work was complete. It was certainly a misconduct on the part of the respondent. The learned Labour Court has observed that while the work was in progress, Zonal Manager used to visit the shop and as such, the Zonal Manager was in know of the fact that the work was in progress. The submission, in fact, is that the higher officer, knowing well that the work was incomplete, if had approved the bill and the establishment has made some payment, then, no wrong can be found with the respondent. In our considered opinion, the argument is misconceived. If a senior officer ignores a wrong committed by a subordinate, the wrong which otherwise is a misconduct would not become right. What is wrong would continue to be a wrong, whether it is objected to or not. If the Zonal Manager does not take an objection to the misconduct committed

by the respondent, the misconduct would not become good conduct nor would it be a feather in the cap of the person who committed the wrong. The only ground on which the learned Labour Court interfered in the matter was that the facts were known to the higher officers and the respondent had deposited an amount of Rs. 25,000/- in the first instance and a sum of Rs. 13,000/- and odd in the second instance. At one place, the Labour Court observed that the guilt was not such which could be satisfied by awarding capital punishment and at the same time, the Labour Court observed that the respondent could be given an opportunity to improve. In a given case, where a wrong leads to a loss to the employer and the wrong is not denied, but the losses are compensated or the damages are paid, then, that may provide mitigating circumstances. But where the misconduct is founded on a fraud then refund of money would not rule out or make the misconduct absolutely nonest.

14. Even on that count, we are unable to hold that the Labour Court was justified in interfering in the matter. The evidence was clear and clinching, the facts were not disputed. If on the facts, which were not disputed, the authority found that a particular employee was not worth reliance, then, they are

certainly entitled to ask the respondent to walk out through the exit.

15. The Labour Court, so also the learned Single Judge were also not justified in interfering with the quantum of the punishment. Even on this count, we hold that the punishment of removal from services was just and proper.

16. For the reasons aforesaid, the appeal is allowed. Judgment of the learned Single judge is set aside. The award made by the learned Labour Court is quashed and the Reference is rejected. Consequently, Civil Application stands rejected.

[R.S. GARG, J.]

[RAVI R. TRIPATHI, J.]

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